APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 200—October Term, 1957.

(Argued January 8, 1958 Decided April 1, 1958.)

Docket No. 24900

FARRIS O. ANDERSON,

Plaintiff-Appellee,

—v.—

NATIONAL PRODUCING CO., a corporation, and GEORGE A. HAMID,

Defendants-Appellants.

Before:

HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

In an action to recover damages for personal injuries allegedly caused by negligence of the defendants, National Producing Co. and George A. Hamid appeal from a judgment for the plaintiff for $55,000 entered on the verdict of a jury by Walter Bruchhausen, *J.*, Eastern District of New York. Affirmed.

Opinion.

RICHARD W. CONDON, New York, N. Y. (James L. Nelligan, New York, N. Y., on the brief), *for plaintiff-appellee.*

RALPH STOUT, New York, N. Y. (Abraham Males and Louis Rothbard, New York, N. Y., on the brief), *for defendants-appellants.*

LUMBARD, *Circuit Judge*:

This is an appeal by the defendants, National Producing Co. and George A. Hamid from a judgment for the plaintiff for $55,000 entered by Judge Bruchhausen, Eastern District of New York, on the verdict of a jury.

The plaintiff, an aerial acrobat, was in the employ of one Peaches O'Neill who was engaged by the defendant National Producing Co. to supply an aerial act to The Hamid-Morton Circus. On May 6, 1952, during a performance in the Jaffa Shrine Temple at Altoona, Pennsylvania, where plaintiff was one of six girl aerialists, the plaintiff fell 18 feet from the rig where she was performing, thereby breaking both heels and suffering injuries to her spine. Miss Anderson alleged that the fall was caused by the absence of a safety loop on the rig and that this was due to the negligence of the riggers who were employees of the National Producing Co. and of The Hamid-Morton Circus.

Suit was brought against the National Producing Co. and George A. Hamid, the appellant, who, concededly, is not individually liable unless there was a partnership between Hamid and Col. Robert H. Morton. Morton actually ran the circus. He was the president of the corporate defendant and all its stock was held or controlled by him. Hamid's defense was that no partnership existed.

Opinion.

As there is ample evidence in the record to sustain the plaintiff's theory that the injuries occurred because of the negligence of the defendants' riggers, the main question before us is whether there was sufficient evidence of Hamid's partnership with Col. Morton to support the jury's verdict against Hamid as a partner. In our judgment a review of the record discloses ample evidence from which the jury could find that Hamid and Morton, in the words of the Uniform Partnership Act, §6, systematically "carried on as co-owners, a business for profit."

In summarizing the proof we include two items of evidence which appellants urge should not have been received, as we find this evidence was properly admitted for reasons we state below. The two disputed items are:

1. A written partnership agreement executed in 1944 between Hamid, Morton and one Barry to carry on the circus business in Canada.

2. A book entitled "Circus" purporting to be the autobiography of defendant Hamid "as told to his son George Hamid, Jr."

The proof was as follows: The route card showing where the circus played in 1952, listed it as the "Hamid-Morton Circus" and gave its address as 10 Rockefeller Plaza, New York, which was then Hamid's office. No "showing dates" could be contracted for unless confirmed by the New York office, for the Altoona date the card noted "(Only acts confirmed by New York office used)."

In a book copyrighted November 21, 1950, entitled "Circus" which purported to be an autobiography of defendant Hamid "as told to his son George A. Hamid, Jr." a picture shows "The Hamid-Morton Circus," and there are numerous items referring to Hamid owning and having his own circus and his pride in doing so. Pages 246 and 247 of the book describe in detail how Hamid and Morton went into

partnership in the "Hamid-Morton Circus," and states "We shook hands on the deal—no written contracts. I was to put the shows together and he was to handle them on the road."

Sometime before this, in 1944, Hamid had formed a partnership with Robert Morton and one Howard Y. Barry, which, according to Barry's testimony, terminated a few weeks later. But in view of the other evidence it was permissible for the jury to conclude that Hamid and Morton continued as partners. At the trial Hamid admitted the 1944 partnership although he had previously denied it on his deposition. Hamid also conceded that in May 1954 he shared profits with Morton but claimed he was not to share any losses.

While Hamid himself testified and contended that his only relationship with the circus was that of booking agent who furnished the acts, many of the admissions he was forced to make, in his deposition and at the trial, supported the plaintiff's claim of his partnership interest: (1) He autographed and sent to many friends copies of the book "Circus" which purported to be his autobiography; (2) He actively traveled with the circus after Morton's death, doing work Morton used to do, feeling "obligations to his widow, and to contracts which had been committed, and committees called and asked if I would pitch in to help out in this emergency. I neglected a lot of my other business in order to do so, and I did."; (3) Shortly before the trial the program for the circus at Palisades Park stated that it was "Under the personal direction of George A. Hamid, Sr."; (4) After Morton's death he asked Morton's widow for an accounting; (5) Although on his deposition Hamid had denied ever being in partnership with Morton and one Howard Y. Barry, at the trial he admitted there had been such partnership in 1944 when he was confronted with Barry's testimony and a certificate of the partnership certified by the County Clerk of New York County.

Opinion.

This summary of the evidence bearing on the Hamid-Morton partnership helps to dispose of the two objections to the admission of evidence, which we now consider.

As to (1), the partnership agreement, this was clearly admissible to refute Hamid's testimony on his deposition that he had never been a partner of Morton, and thus impeach his credibility. *Lee Dong Sep* v. *Dulles*, 220 F. 2d 264 (2 Cir. 1955); 3 Wigmore, Evidence §§1017, 1018 (3rd Ed. 1940). In view of Hamid's admitted connection with this circus for many years, the partnership agreement was admissible in any event as it was evidence of the nature and extent of their relationship, which, when taken with the other evidence, was relevant to the question of their alleged partnership in May 1952.

As to (2), the admission in evidence of the book "Circus," subtitled as the defendant Hamid's autobiography, was proper for two reasons. First, the certificate of copyright registration and the current catalogue of copyright entries both showed George A. Hamid and his son to be the authors of the book "Circus." 17 U. S. C. A. §§209 and 210 respectively provide that the certificate and the catalogue "shall be admitted in any court as prima facie evidence of the facts stated therein." There is no reason to limit the use of such evidence. The language of the statute is clear. Even though the registration has been made by the publisher, the circumstances and reasons for the registration are some guarantee that authors are sufficiently safeguarded against the likelihood of inaccurate registration. Having established prima facie the authorship of the book, any statements in it bearing on the issues were relevant as admissions of George A. Hamid. He was free to disclaim the prima facie showing but, as we have pointed out, his cross examination, far from refuting the records, seems to have confirmed his responsibility for the book and the statements in it which bore

on his partnership with Morton in the Hamid-Morton Circus.

The appellant also assigns as error the admission of testimony of the plaintiff's mother to the effect that on May 7, 1952, the day after the plaintiff's fall, she went to the circus to get her daughter's trunk. Over objection she testified that she talked with Morton. She first asked for Mr. Hamid, but was told by Morton that he, Morton, was Hamid's partner, that Hamid was not then in the city, but that he, Morton, would talk to her. She informed Morton that she had come for her daughter's personal belongings and that her daughter had told her she fell because there was no safety loop on her rigging. To this Morton replied that he had personally checked the rigging after the accident and ordered the riggers to put on a safety band at once. Although there is authority to the effect that a statement of an alleged partner may be admitted to show the existence of the partnership if a prima facie showing has been made by other evidence, *Pryor* v. *Hale-Hassell Grocery Co., Inc.*, 80 F. 2d 995, 997 (10 Cir. 1936); *Katz Exclusive Millinery* v. *Reichman*, 14 F. R. D. 37 (W. D. Mo. 1953) it is not necessary for us to pass on that question in this case. Here the joint activity over a long period of time, the sharing of profits, the partnership certificate filed in 1944, the use of the name Hamid-Morton Circus, the admissions in the book, clearly pointed to the existence of the partnership and any error, if it was error, resulting from the admission of Mrs. Anderson's testimony was harmless.

Hamid's personal liability does not depend upon an express agreement to share losses as Hamid earnestly contends. For the agreement to share losses may be inferred where all of the other elements of a partnership are present. *Mill Factors' Corp.* v. *Margolies*, 210 App. Div. 739, 206 N. Y. S. 434, 437, for history after remand see 219 App.

Div. 783, 220 N. Y. S. 888, appeal dismissed 245 N. Y. 602, 157 N. E. 875. See 68 C. J. S. 449.

Moreover, the district judge properly charged the jury on the theory that Hamid might be found liable as a joint adventurer as well as on the partnership theory. The basis and scope of the liability of a joint adventurer in this situation is indistinguishable from that of a partner. However, under the law of New York it is clear that a joint adventure may exist without a sharing of losses. *Mariani* v. *Summers*, 52 N. Y. S. 2d 750, 755, affirmed 269 App. Div. 840, 56 N. Y. S. 2d 537 (First Dept.); *Usdan* v. *Rosenblatt*, 93 N. Y. S. 2d 862.

Thus, whether the verdict was based on a partnership or a joint adventure theory, the absence of an express agreement to share losses is not fatal.

Appellants also claim the district judge erred in denying their motion to amend the answer, made at the end of plaintiff's case, to set up §203 of the Pennsylvania Workmen's Compensation Act[1] as a defense. This was an affirmative defense and could not be availed of under a general denial. Rule 8(c) Federal Rules of Civil Procedure, 28 U. S. C. A. The motion was not made until eight days after the trial had started. The answer had been filed for over three years. All the pre-trial examinations had been taken and the plaintiff had closed her case, resting it on a theory of common law negligence, before the defendant brought up this new matter. Judge Bruchhausen in a proper exercise of his discretion denied the motion as coming too late. Rule 15 (a) Federal Rules of Civil

---

[1] "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

Procedure, 28 U. S. C. A., *Shick* v. *Fuch*, 8 F. R. D. 639 (S. D. N. Y. 1944). The appellant also argues that the District Court should have taken judicial notice of the Pennsylvania Workmen's Compensation Act under §344a of the New York Civil Practice Act. Rule 43a Federal Rules of Civil Procedure, 28 U. S. C. A. Section 344a expressly gives the trial court discretionary power and we see no abuse of discretion in refusing to take notice of the Pennsylvania Act when it was not pleaded and when the judge properly denied the motion to amend the pleadings under the circumstances we have set forth above.

The other claims of error are so patently without merit that they do not warrant discussion.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of April one thousand nine hundred and fifty-eight.

Present: HON. CARROLL C. HINCKS,
" J. EDWARD LUMBARD,
" STERRY R. WATERMAN,
Circuit Judges.

FARRIS O. ANDERSON,

Plaintiff-Appellee,

v.

NATIONAL PRODUCING COMPANY and GEORGE A. HAMID,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Extract From Record

(310a) The Court: All right, does plaintiff rest?

Mr. Condon: Yes, your Honor.

The Court: Take a five-minute recess.

(A five-minute recess was taken at this point.)

Mr. Rothbard: I take it, your Honor, that the Court will take judicial notice of the laws of Pennsylvania?

The Court: I think not.

Mr. Condon: I think, your Honor, we are now going to discuss the matter of Pennsylvania law.

The Court: The first item is, before you get to that, whether or not this Court can take judicial notice of the law of Pennsylvania.

Mr. Condon: I don't think there is any doubt about it, your Honor, if the matter is pleaded and set up in the pleadings. However, I would like the record to show—

The Court: I think that is what they want to do, to plead.

Mr. Condon: Yes.

The Court: Maybe I better hear the application of Mr. Rothbard and then you may reply, if you see fit.

Mr. Rothbard: Preliminary to my application, your Honor, I was inquiring of the Court, I think it is the rule, I don't think there is any doubt, that this Court will take judicial notice of the Pennsylvania statute, that is so, is it not, your Honor?

The Court: Well, I haven't checked it, but I think Mr. Condon has added that, if it is pleaded, isn't that it?

Mr. Rothbard: Whether pleaded or not, first my preliminary question is,—it is our contention—the (311a) defendant contends that this Court, by its rules, does and must take cognizance of the statutes of the State of Pennsylvania. I have referred to the specific rule in the memorandum.

The Court: Yes, I am looking at it now.

Mr. Rothbard: And the appropriate civil practice act provision.

The Court: I wonder if you have cited the right section here. I don't see it, Rule 42.

Mr. Rothbard: Professor Stout who wrote this memo says—

The Court: Which you alluded to in my volume, it speaks of consolidation of trials.

Mr. Rothbard: Well, the first reference is that Rule 42A of the Federal Rules of Civil Procedure provided, "All evidence shall be admitted—"

The Court: What I am trying to find is the rule, Mr. Rothbard, I don't find the rule in my volume here as Rule 42.

Mr. Rothbard: 42A.

The Court: 42A is consolidation of cases, there is some error.

Mr. Rothbard: I think—no matter whether the rule—it may not be properly numbered, but what is quoted matter has always been the practice in this court, which is, that all evidence shall be admitted which is admissible under rules of evidence applied in general jurisdiction in the state in which the United States Court is held and then we go to show 44A of the Civil Practice Act authorized the courts of New York State to take judicial notice of the statute of another state. And 43A—43A,* would that help, your Honor?

---

* Rule 43(a) of the Federal Rules of Civil Procedure, which provides, so far as material, as follows:

> (a) *Form and Admissibility.* • • • All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. • • •.

The Court: It may be 43A, it speaks of evidence.

Mr. Rothbard: The above quotes under Rule 43A, the rule with respect to judicial notice of the statutes (312a) of law of another state is extended to the United States District Court in New York State.

The Court: You are probably reading something different than I have here, although it does say something about evidence. I don't disagree with you. It seems to me that that is so.

Mr. Rothbard: So we then come to the next point, here is a resident of Kentucky.

The Court: Yes, I imagine the major item we have to consider here is whether or not it is relevant to this case.

Mr. Rothbard: Well, as your Honor said, on the item of partnership and copyright, I think the question was first of its admissibility or competency, how probative it was.

The Court: That is right.

Mr. Rothbard: What weight we shall attach.

The Court: The first item is the item of admissibility. We have now the category whether it is relevant.

Mr. Rothbard: Now, we have a resident of Kentucky injured in Pennsylvania and I think your Honor was the first one who raised the point in chambers at the very beginning of this trial, as to what law of what state applied. You Honor, Mr. Condon and I were in agreement that the law of Pennsylvania applied.

Mr. Condon: That is not my statement at all that I am in agreement on the act.

Mr. Rothbard: Well, that is definitely so.

The Court: I only mentioned that it was informal, along the line.

Mr. Rothbard: That is true, we agreed.

The Court: It is usual wherever you have some controversy, that the substantive law, of the place of that controversy or injury—

(313a) Mr. Rothbard: That must apply.

The Court: —applied.

Mr. Rothbard: That has always been the rule. If I am injured in California whether by motor vehicle or otherwise, or other mishap, the law of that place will govern my rights.

The Court: The substantive law.

Mr. Rothbard: Surely, then substantive law is always implemented by statutory law. This plaintiff can't say—

The Court: What I am speaking of is substantive law.

Mr. Rothbard: You mean common law.

The Court: Substantive law as distinguished from procedure.

Mr. Rothbard: Substantive law would include statutory law. Now, here is a lady who is injured in the State of Pennsylvania, admittedly the law of Pennsylvania as it then existed would state what are the respective duties and obligations of the people to a lawsuit. Just because the plaintiff in a complaint—as a matter of fact I have never seen such a skimpy complaint, there is no allegation of partnership, no allegation of ownership, or control, there is no allegation that—

The Court: You needn't elaborate on this.

Mr. Rothbard: So they prefer to make no reference to Pennsylvania law. If they didn't know about it, that is no excuse either, if they did not know about it, then it was omitted. But that doesn't alter the fact that Pennsylvania law, in effect at the time this girl was hurt, governs the rights and mutual obligations of this party.

The Court: All right, what is your application?

Mr. Rothbard: The defendant—I really don't feel that an amendment is necessary, because if the (314a) Court takes judicial notice of the laws of that state, then I need only call your Honor's attention the existing law at that time. As a matter of form, I move that the answer presented by someone other than myself, be deemed amended

to set forth the statutory law, in effect in Pennsylvania, at the time of this mishap, and that consists of Section 203 of the Pennsylvania Workmen's Compensation Act, the volume of which I have given to your Honor, and I ask that our answer be deemed amended in that respect. I think it is just a matter of form. We couldn't aiter—

The Court: I understand your point. What do you say, Mr. Condon?

Mr. Condon: I have this to say. First parenthetically, as you know, I have not interrupted Mr. Rothbard at all in his argument. I hope I will not be interrupted by Mr. Rothbard.

The Court: Go ahead.

Mr. Condon: As to the complaint itself, I think your Honor will see it is drawn in accordance with such a complaint, according to rules. As to this doctrine Mr. Rothbard is now raising for the first time by a motion at the close and completion of the plaintiff's case, if Mr. Rothbard wished to rely on the law of Pennsylvania, he should have set that up in his answer well in advance of the trial. That would be a terrific entrapment if he waited until the plaintiff's case is finished and say, now, "We will change the rules and have some other law." If that law should have applied he should have so stated long before the trial commenced. You can't get in the middle of a stream and say, "Now, we will change the rules around."

The Court: What do you say is applicable to the situation?

(315a) Mr. Condon: I say, your Honor, under the rule in the Federal Court, and I have had it before in the Southern District, the rule is that unless the pleadings alleged some other law, the law of the forum is deemed to apply, on the presumption that is the same as the law of the situs of the place or whatnot. But if you want to

apply other law, you have got to warn people. You can't wait until they finish the plaintiff's case and then come in and say, "We are going to shift and try some other law." It is entirely too late for that now.

Mr. Rothbard: Let's see if Mr. Condon is finished.

The Court: He says you are too late.

Mr. Rothbard: Let's take the subject entrapment; who did the entrapment? The plaintiff is presumed to know the law that governs her rights, her counsel omitted all reference to that law. He would like to have the law of New York apply, where admittedly and in conscience, as it is a matter of custom, the rule of law has always been—every student has been taught it, that the place where you are hurt, it is the law of that place that will govern every right. That is academic and fundamental. So who is entrapped, the plaintiff or the defendant? They either don't mention or don't want to mention it. So we are to be penalized because we discovered in Pennsylvania there are certain laws? If they didn't know it, then it is ignorance.

The Court: He said, as I understand it, there is some rule or decision of the Federal Court that indicates the law be applied unless the rule—

Mr. Rothbard: I think in the absence of other law.

The Court: Is there any case of authority on that point?

(316a) Mr. Rothbard: I would like to see a case where specific laws shall be deliberately ignored once called to a Court's attention. We didn't bring this lawsuit. This is the plaintiff's suit.

The Court: I am trying to analyze the point that Mr. Condon mentioned.

Mr. Condon: That thing arose in a case which came before Mr. Justice Waring, who is in North Carolina.

The Court: Was there some decision on that?

Mr. Condon: Well, it never—we wanted to, and the other side never appealed it, so it is not reported, but it came up in the Southern District before a North Carolina judge, Waring, who was sitting here from the Southern District in North Carolina, and that proposition appeared in this case.

The Court: Was there any authority stated?

Mr. Condon: No, your Honor, there was some authority, and it is my best recollection, I believe quite strongly that I am right, if you want, if Mr. Rothbard wants to rely on the law of Pennsylvania, it is up to him in his answer to set that forth and let everybody, the Judge, the plaintiff, and—

Mr. Rothbard: I can answer—

Mr. Condon: Just one moment, let everybody know at the start of the trial.

Mr. Rothbard: How about letting us know on what law you depend on bringing the suit? You have the burden? We have a right to put in a general denial. You say, at the time my client was hurt a certain law was applicable. We admit as lawyers the law of the place where she was hurt ordinarily would apply. So while ignoring that existing law, if you didn't know it, you were remiss. If you did know it, it was kept out deliberately. Either way, you want the defendant penalized be- (317a) cause you have not sought to plead or call to the Court's attention the law which then dictated your client's rights.

The Court: I think I should reserve decision on this matter. It wouldn't change the nature of the proof, and possibly before we get through, you may have some further light on it.

Mr. Rothbard: That could be.

The Court: I reserve decision on the matter.

* * * * *

Motions.

(321a) The Court: I have your point, I think, gentlemen. We don't want to keep the jury out there too long. They will be wondering whether we are participating in the trial or not. I would think it would be wise now to recess until 2 P. M. I will reserve decision for the moment. You may call the jury in right here. They don't have to go into the box.

Mr. Rothbard: Has you Honor made a ruling on my motion to amend the answer?

The Court: No, I am reserving decision.

Mr. Rothbard: On that, too?

The Court: To weigh these matters between now and the resumption of the case.

(The jury filed into the courtroom, standing before the bench.)

The Court: Ladies and gentlemen, I just want to say it is getting close to one o'clock and we will recess until 2 P. M.

(Court adjourned until 2 P. M.)

(322a) The Court: First, on the matter of this statute of Pennsylvania, I understand you wish to amend the answer under statute Section 293 of the Pennsylvania Workmen's Compensation Act, am I right in that, Mr. Rothbard?

Mr. Rothbard: That is a part of the application. The other is to have your Honor take judicial notice of the statute.

The Court: Well, first on the question of the pleading, as I have examined it—as many cases as time permitted—and taking into consideration all of the factors, the time of the making of this application, and all the other matters, I have concluded that the motion should be denied.

Mr. Rothbard: To that I except.

The Court: I think it is unnecessary to take judicial notice in lieu of that.

Motions.

Mr. Rothbard: Does your Honor deny my application that you take judicial notice of the law?

The Court: I think it is unnecessary to take judicial notice. I just said in connection with the proposed amendment, it would be superfluous.

Mr. Rothbard: It seems to me, your Honor, that considering the rights of the defendants, they ought to have the position taken that by judicial notice the statute of Pennsylvania be noted or declined to be noted so that—

The Court: I will make a ruling on that and for all the reasons that I have stated. I determined that it is unnecessary to consider the matter of whether or not judicial notice should be taken.

(323a) Mr. Rothbard: To your Honor's declination to rule on my application that the Court take judicial notice of the Pennsylvania law, I respectfully except. On the other denial I also respectfully except. I urge it is not our burden to call the law of Pennsylvania to your attention. It is the plaintiff's burden. This is a plaintiff's lawsuit.

The Court: Yes, I am fully aware of your position, Mr. Rothbard. I made my ruling. As to the other motions made by the defendant, they are denied.

Mr. Rothbard: To that I except.

The Court: All right, are you ready to proceed?

Mr. Rothbard: I thought your Honor said before we adjourned you were going to give us a chance to file a memo.

The Court: I don't think that was so. If so, I will be glad to be reminded of that.

Mr. Rothbard: I understood that you said you wanted that.

The Court: In view of that I will reserve decision on all motions other than the one connected with the Pennsylvania statute. I don't want to deprive you of any opportunity.

Motions.

Mr. Condon: I am not quite clear on the status of that. What motion is decision reserved on?

The Court: On all motions made by the defendant other than the one respecting the Pennsylvania statute.

Mr. Condon: And that is denied?

The Court: Yes.

Mr. Rothbard: And to the reservation I think your Honor suggested it would be better that the defendant take exception to the reservation?

The Court: All right.